STATE OF MICHIGAN

COURT OF APPEALS

TERESA KOCOLOSKI-YOUNG,

Plaintiff-Appellant,

v

COCA-COLA ENTERPRISES, KROGER COMPANY and BALL CORPORATION,

Defendants-Appellees.

and

COCA-COLA COMPANY,

Defendant.

UNPUBLISHED
March 28, 2006

No. 264119
Wayne Circuit Court
LC No. 01-143323-NP

Before: Borrello, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Plaintiff Teresa Kocoloski-Young appeals from an order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10) for lack of a genuine issue of material fact. We reverse.

Plaintiff claims to have suffered eye injuries after opening a can of Diet Coke that sprayed her in face and entered both of her eyes. Both the can, and the beverage were designed and manufactured by Coca-Cola Enterprises (Coke) and sold by Kroger Company (Kroger). Ball Corporation (Ball) manufactured the can in accordance with Coke's plans and specifications. The packaging did not list any warning that the beverage may exit the can at a high velocity upon opening, or that the beverage could pose potentially harmful results if it were to come into contact with a person's eyes.

I. FACTS

On December 31, 1998, plaintiff purchased a twelve-pack of Diet Coke from her local Kroger grocery store. Plaintiff placed the twelve pack in her garage to keep cool. On January 7, 1999, plaintiff was on the telephone with a friend when she desired a soft drink. Plaintiff put her call on hold, proceeded up the stairs, and retrieved a can of Diet Coke from her garage. Upon returning to the basement she continued with her call. As plaintiff began to open the can, she

heard a loud noise and was instantaneously sprayed in the face with the beverage. The beverage had entered plaintiff's eyes and she was unable to open her eyelids. Plaintiff ended her conversation on the telephone and waited a number of minutes for her eyes to clear. Her eyes not having cleared after approximately five minutes and still unable to open her eyelids, plaintiff felt her way up the stairs and into her bedroom where she woke her husband, who promptly drove her to the emergency room.

The emergency room physician examined plaintiff and found multiple abrasions on both of her eyes. Plaintiff was later referred to an ophthalmologist, who diagnosed plaintiff's condition as superior limbic keratoconjunctivitis (SLK), coupled with severe dry eye.

In her deposition, plaintiff testified that the can of Diet Coke she opened that morning was not frozen and that the can itself was not bulged, dented, or otherwise deformed. Plaintiff further testified, that upon inspecting the can after the incident she saw that the drinking hole on the top lid had not opened as it was designed to. Instead, a small hole the size of a pen tip formed at the tip of the perforated edge of the drinking hole. The can's lid was also bulged out, this was presumably caused by the internal pressure of the can being released at a high velocity.

Plaintiff offered evidence in the form of medical reports from her emergency room physician and ophthalmologists, in which they stated that plaintiff's injuries were most likely caused by the "explosion of Coke into her eyes." Plaintiff's ophthalmologist also stated in his report that Diet Coke acts as a moderately strong acid, however, he could not be one hundred percent certain it influenced her degree of injury. Plaintiff hired an expert who would testify at trial that the can was defective, causing plaintiff to be sprayed in the face. The expert would also testify at trial that the chemical composition of Diet Coke was acidic enough to cause the symptoms plaintiff now suffered from.

Coke and Ball moved for summary disposition pursuant to MCR 2.116(C)(10), on the basis that there was no genuine issue of material fact that plaintiff's injuries were proximately caused by Coke or Ball's negligence in manufacturing a defective product, or breach of an implied warranty. Kroger similarly filed for summary disposition under MCR 2.116(C)(10), arguing that plaintiff had failed to offer proof establishing that Kroger, as a seller of the Diet Coke, had breached any duty of express or implied warranty or was independently negligent in its handling of the product from the time it was received by the store until it was purchased by plaintiff. These arguments formed the basis for the trial court's decision to grant summary disposition.

II. ANALYSIS

This Court reviews a decision on a summary disposition motion de novo.[1] A motion under MCR 2.116(C)(10) tests whether there is any factual support for a claim and is reviewed to determine whether the affidavits, pleadings, depositions, or any other documentary evidence

[1] *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

establish a genuine issue of material fact to warrant a trial.[2] This Court looks at all evidence in a light most favorable to the nonmoving party and will give that party the benefit of all reasonable inferences when determining whether summary disposition is appropriate.[3] The nonmoving party must go beyond the pleadings to offer specific facts and evidence showing that a genuine issue of material fact exists.[4] Where the opposing party fails to present evidence establishing the existence of a material factual dispute, the motion is properly granted.[5] A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ.[6]

As a general rule, a manufacturer and seller owe a duty to supply consumers with a product that is not unreasonably dangerous when used in a manner for which it is intended, or when used in a manner reasonably foreseeable by the manufacturer.[7] In the instant case, this Court must look separately at the design of both the can and the beverage to determine if plaintiff offered sufficient proofs that one or both were defective. Further, this Court must consider whether plaintiff has offered sufficient proofs to show that if a printed warning would have been in place, that she would have heeded that warning.

i.) The Can

A product is defective if it is not reasonably safe for its foreseeable purposes.[8] To make out a prima facie case under a products liability standard, a plaintiff must show (1) that defendant supplied a defective product, and (2) that the defect was the proximate cause of plaintiff's injury. "The threshold requirement is the identification of the injury-causing product and its manufacturer."[9]

Plaintiff argues that she has established a prima facie case because she has offered proof of both the magnitude of risk, and evidence concerning the unreasonableness of the can's design.[10] This proof consisted of a list of 130 exploding can injuries documented over a eleven-year period and an expert who would attest that the can was defective.

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[2] *Id.*

[3] *Betrand v Alan Ford, Inc,* 449 Mich 606, 617-618; 537 NW2d 185 (1995).

[4] *Quinto v Cross & Peters Co,* 451 Mich 358, 362; 547 NW2d 314 (1996); MCR 2.116(G)(5).

[5] *Id.* at 363.

[6] *West v General Motors Corp,* 469 Mich 177, 183; 665 NW2d 468 (2003).

[7] *Antcliff v State Employees Credit Union,* 95 Mich App 224, 230; 290 NW2d 420 (1980); MCL 600.2947.

[8] *Villar v EW Bliss Co,* 134 Mich App 116, 121; 350 NW2d 920 (1984).

[9] *Mascarenas v Union Carbide Corp,* 196 Mich App 240, 249; 492 NW2d 512 (1992).

[10] *Owens v Allis-Chalmers Corp,* 414 Mich 413, 429; 326 NW2d 372 (1982).

The trial court properly held that plaintiff failed to meet her burden of supplying proof that her injuries were proximately caused by a defect in the Diet Coke can. Plaintiff's proofs fall short for a number of reasons. First, looking at the prior incident reports, the descriptions of the various accidents are vague. One incident of a Coke-brand can exploding is listed; however, the report gives no information as to how or why the explosion occurred. Second, plaintiff's expert offers no proof that the can was defectively designed. Throughout his deposition, the expert repeatedly responded that he lacked information or knowledge of the incident in question. For example, when asked if he had any opinion as to the safety of the can, he responded, "I don't have an opinion." When asked if the can was defective, he responded, "I couldn't do the testing to come to that conclusion." These attempts fall short to prove a defect in the can; therefore, to this issue alone, the grant of summary disposition was appropriately granted by the trial court.

ii.) The Beverage

When manufacturing a product that is to be placed in the stream of commerce, a "manufacturer has a duty to 'eliminate any unreasonable risk of foreseeable injury.' "[11] Coke, as manufacturer of the Diet Coke beverage, and Kroger as the seller of the product have this duty. It is foreseeable that consumers of any carbonated beverage, Diet Coke included, could be sprayed in the face by the beverage, or have the beverage enter the eyes for any number of reasons. It is plaintiff's argument that the chemical composition of Diet Coke is highly acidic and that exposure to the eyes is harmful. Plaintiff argues that this is a foreseeable harm and that the beverage getting into a person's face is also a foreseeable occurrence; therefore, it is defendants' duty to at least provide a warning to consumers of this potential danger.

The trial court erred in holding that plaintiff failed to offer proof of this potential harmful chemical composition. Plaintiff has offered evidence through her own testimony, her emergency-room physician, and ophthalmologists that show her injuries could very well have been proximately caused by her exposure to the beverage. Plaintiff's emergency-room physician wrote in a report, " . . . I have never seen this kind of injury before where splashing of a carbonated beverage into the eye would cause so much damage, even though I guess with the force given, it is possible." Plaintiff's first ophthalmologist wrote in his report, "It is my opinion that both the SLK and the dry eyes may have been agitated, or even triggered, by the severe high-velocity Diet Coke injury. In addition, Diet Coke is a moderately strong acid. Whether the acidity may have influenced in the degree of injury, I cannot be 100% sure." Plaintiff's second ophthalmologist wrote in his report, "There is nothing to make me disbelieve that [plaintiff's] dry-eye condition is related to the carbonated beverage exposure of January 1999." Further, plaintiff provided evidence in the exploding-can-incident reports, showing there was a prior incident involving a Coke can that exploded. In that instance, the contents entered into a person's eyes, and that person subsequently suffered from conjunctivitis.

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[11] *Bazinau v Mackinac Island Carriage Tours*, 233 Mich App 743, 757; 593 NW2d 219 (1999), quoting *Prentis v Yale Mfg Co*, 421 Mich 670, 693; 365 NW2d 176 (1984).

iii.) Failure to Warn

When a manufacturer negligently fails to warn of potential dangers in its product, that failure renders the product defective even if the product functions properly.[12] To establish a prima facie case of negligent failure to warn, plaintiff must show: (1) defendants owed plaintiff a duty to warn of danger, (2) defendants breached that duty, (3) defendants' breach was the proximate and actual cause of plaintiff's injury, and (4) plaintiff suffered damages.[13] However, where the dangerous features or qualities are open and obvious, there is no duty to warn.[14]

In the instant case, although it is reasonable to conclude that exposing one's eyes to Diet Coke would be an open and obvious hazard, the excessive damage that plaintiff sustained and continues to suffer from is not. Diet Coke cannot be considered a simple product given the numerous ingredients that make it up. It is not common knowledge that exposure to these ingredients could be harmful. In *Greene v A P Products*,[15] a small child died after drinking a hair-care product that was labeled as being made from all natural products. This Court reasoned that the product in that case, although claiming to be made of natural products, also contained numerous chemicals and preservatives. Considering the numerous ingredients involved in its composition, it could not be considered a "simple" product.[16] Given this fact, the dangerous quality of the product could not be within the realm of common knowledge as to say the dangers were open and obvious.[17]

Plaintiff has supplied proof that she did not know of the harm that could be had from exposure to Diet Coke and the product's ingredients. During plaintiff's deposition, when asked why she had only drank Diet Coke once since the accident, plaintiff responded, "Quite honestly, I avoid aspartame.[18] I found out after doing my research on when this happened the dangers of aspartame, and that's when I got my husband off of it, and I will not let my daughter touch it, so for that reason."

Plaintiff has offered sufficient proof that her exposure to the beverage may have been the proximate cause of her SLK and dry-eye condition. This Court must also stand behind its holding in *Greene*, *supra*, and reason that because the ingredients of Diet Coke are not commonly known to laypersons to be overtly dangerous, that the repercussions of getting Diet Coke in the eyes is not open and obvious. A genuine issue of material fact exists as to the

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[12] *Gregory v Cincinnati Inc*, 450 Mich 1, 11; 538 NW2d 325 (1998).

[13] *Tasca v GTE Products Corp*, 175 Mich App 617, 622; 438 NW2d 625 (1988).

[14] Glittenberg v Doughboy Recreational Industries (On Rehearing), 441 Mich 379, 387-388; 491 NW2d 208 (1988).

[15] 264 Mich App 391; 691 NW2d 38 (2004).

[16] *Id*. at 401

[17] *Id*.

[18] Aspartame is the scientific name for the artificial sweetener commonly known as Nutrasweet.

potential danger of the beverage, therefore, it was error for the trial court to grant summary disposition under MCR 2.116(C)(10). The resolution of plaintiff's theory is not for this Court to determine here, but for a jury to hear and decide upon at trial.

Reversed.

/s/ Stephen L. Borrello
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald